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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

16 EBAY INC.,	)	CASE NO. CV 08-4052 JF (PVT)
17)	
18 Plaintiff,	)	EVIDENTIARY OBJECTIONS TO
19 vs.	)	DECLARATION OF COLLEEN M.
20	)	KENNEDY SUBMITTED IN SUPPORT
21	)	OF EBAY, INC.'S CONSOLIDATED
22 DIGITAL POINT SOLUTIONS, INC.;	)	OPPOSITION TO (1) THE MOTIONS TO
23 SHAWN HOGAN; KESSLER's FLYING	)	DISMISS THE SECOND AMENDED
24 CIRCUS; THUNDERWOOD HOLDINGS,	)	COMPLAINT BY DEFENDANTS
25 INC.; TODD DUNNING; DUNNING	)	DIGITAL POINT SOLUTIONS, INC.,
26 ENTERPRISES, INC.; BRIAN	)	SHAWN HOGAN, THUNDERWOOD
27 DUNNING; BRIANDUNNING.COM; and	)	HOLDINGS, INC., KESSLER'S FLYING
28 DOES 1-20,	)	CIRCUS, BRIAN DUNNING,
	)	BRIANDUNNING.COM, TODD
Defendants.	)	DUNNING, AND DUNNING
	)	ENTERPRISE, INC.; AND (2) THE
	)	MOTIONS TO TRANSFER BY
	)	DEFENDANTS DIGITAL POINT
	)	SOLUTIONS, INC., SHAWN HOGAN,

**TODD DUNNING AND DUNNING
ENTERPRISE, INC.**

Date: June 26, 2009

Time: 9:00 a.m.

Judge: Honorary Jeremy Fogel

Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (collectively, "KFC Defendants") submit the following Evidentiary Objections to the Declaration of Colleen M. Kennedy, which was submitted in support of Ebay, Inc.'s Consolidated Opposition To (1) The Motions To Dismiss The Second Amended Complaint By Defendants Digital Point Solutions, Inc., Shawn Hogan, Thunderwood Holdings, Inc., Kessler's Flying Circus, Brian Dunning, Briandunning.com, Todd Dunning, and Dunning Enterprise, Inc.; and (2) The Motions To Transfer By Defendants Digital Point Solutions, Inc., Shawn Hogan, Todd Dunning and Dunning Enterprise, Inc.:

DECLARATION OF COLLEEN M. KENNEDY

DATED JUNE 5, 2009^{1/}

TESTIMONY	EVIDENTIARY OBJECTIONS
1. I am a member of the Bar of the State of California and am associated with the law firm of O'Melveny & Myers LLP, counsel of record for Plaintiff eBay Inc. ("eBay"). I submit this declaration in support of eBay's Consolidated Opposition to the Motions to Dismiss the Second Amended Complaint by Defendants Digital Point Solutions, Inc. and Shawn Hogan (collectively, the "DPS Defendants"); Thunderwood Holdings, Inc.,	1. Objection as to personal knowledge of Declarant as specified below.

^{1/} Paragraph numbers track Ms. Kennedy's declaration and underscoring reflects the particular statements to which the KFC Defendants object.

1 Kessler's Flying Circus ("KFC"), Brian
2 Dunning, and briandunning.com
3 (collectively, the "KFC Defendants"); Todd
4 Dunning and Dunning Enterprise, Inc.
5 (collectively, the "TD Defendants"); and the
6 Motions to Transfer by the DPS Defendants
7 and the TD Defendants. I have personal
8 knowledge of the facts set forth in this
9 declaration and, if called to testify as a
10 witness, could and would do so competently.

11 2. Defendants' motions raise a number of
12 factual issues inappropriate to a motion to
13 dismiss. Even if the Court chose to convert
14 any of Defendants' motions to a motion for
15 summary judgment, discovery would be
16 required on a number of facts essential to
17 any summary judgment ruling. A summary
18 judgment ruling on the issues raised by
19 Defendants would require resolution of at
20 least the following disputed factual Issues:

21 a. There is a factual dispute
22 regarding the existence and terms of any
23 binding agreement between Defendants and
24 Commission Junction, Inc. ("CJ").
25 Specifically, there are unresolved questions
26 of fact regarding: (1) whether any binding
27 agreement was ever entered into between any
28 Defendant and CJ; (2) which Defendants

2. Objection. This is argument, not a declaration of facts. These statements should not be considered by the Court because the statements constitute a transparent and bad faith attempt to exceed the page limitation ordered by the Court, and are not otherwise admissible evidence.

1 entered into such binding agreements, if any:
2 (3) when any such binding agreements were
3 executed; and (4) the terms of any such
4 binding agreements. There is likely to be
5 evidence controverting Defendants'
6 statements on these issues in light of the
7 inconsistent positions Defendants have taken
8 in this litigation and in their separate
9 litigation with CJ (the "CJ Action"), as
10 discussed in eBay's Consolidated Opposition
11 to Defendants' Motions to Dismiss and
12 Motions to Transfer ("Opposition").

13 b. There is a factual dispute
14 regarding whether, to the extent any binding
15 Publisher Service Agreement ("PSA")
16 existed between any of the Defendants and
17 CJ that contained a contractual limitations
18 provision triggered by termination of the
19 PSA, such termination ever occurred. There
20 is also a dispute of fact as to when any such
21 termination occurred, if it did. There is
22 likely to be evidence controverting
23 Defendants' statements on these issues in
24 light of the inconsistent positions Defendants
25 have taken in this litigation and in the CJ
26 Action, as discussed in eBay's Opposition.

27 c. There is a factual dispute
28 regarding whether CJ had any authority to

1 release the claims asserted by eBay in this
2 litigation through the agreement it entered
3 into with the KFC and TD Defendants to
4 settle the CJ Action. Specifically, there are
5 unresolved questions of fact regarding: (1)
6 whether any agreement exists that expressly
7 creates an agency relationship between CJ
8 and eBay for purposes of litigation; (2)
9 whether eBay asserted any control over CJ
10 during the course of the prosecution and
11 settlement of the CJ Action; (3) whether CJ
12 representatives believed CJ was acting as
13 eBay's agent for purposes of the settlement;
14 (4) whether Defendants believed that CJ was
15 acting as eBay's agent for purposes of the
16 settlement; (5) whether any such belief was
17 reasonable under the circumstances;
18 (6) whether any such belief was caused by
19 some act or neglect by eBay; (7) whether
20 Defendants investigated the scope of CJ's
21 authority in connection with the settlement;
22 (8) whether eBay's claims were discussed
23 during the negotiation of the settlement
24 agreement; (9) whether CJ made any
25 representations about its authority to release
26 eBay's claims; and (10) whether the parties
27 intended CJ's release of its claims to release
28 eBay's claims as well. There is likely to be

controverted evidence on these issues in light of the facts known to eBay and the positions taken in Defendants' motions.

d. There is a factual dispute regarding the diligence of eBay's inquiry into Defendants' fraudulent schemes and, to the extent Defendants claim that eBay was unreasonable in relying on Defendants' fraudulent representations, the reasonableness of eBay's reliance thereon. Specifically, there are unesolved questions of fact regarding: (1) the investigation and other actions taken by eBay in response to various statements regarding Defendants' fraudulent schemes; (2) the difficulty of detecting such schemes; (3) the technological and other methods used by Defendants to conceal their schemes; and (4) the nature of the analysis undertaken by eBay that ultimately uncovered Defendants' schemes. There is likely to be controverted evidence on these issues in light of the facts known to eBay and the positions taken in Defendants' motions.

3. Many of the facts relevant to these factual disputes are in the exclusive knowledge of Defendants and third parties, including facts related to any agreement between Defendants

3. Objection. This is argument, not a declaration of facts. These statements should not be considered by the Court because the statements constitute a transparent and bad

1 and CJ, the termination of any such
2 agreement, statements made during the
3 negotiation of the settlement of the CJ
4 Action, and the nature of Defendants'
5 technological methods.

faith attempt to exceed the page limitation
ordered by the Court, and are not otherwise
admissible evidence.

6 4. Discovery regarding the above-listed
7 disputed factual issues has not been
8 completed for a number of reasons, most
9 within Defendants' control. First, several of
10 these factual issues were raised for the first
11 time in Defendants' recent motions to
12 dismiss and were unanticipated by eBay,
13 including issues related to the purported
14 termination of the PSA and the settlement
15 agreement between Defendants and Cl.
16 Second, in response to the discovery
17 propounded by eBay to date, Defendants
18 have asserted their Fifth Amendment rights
19 against self-incrimination and have also
20 contended that the documents responsive to
21 eBay's requests are in the possession of the
22 FBI and therefore unavailable. Because
23 Defendants have asserted their Fifth
24 Amendment rights, because the TD and KFC
25 Defendants refused to provide testimony in
26 the CJ Action based upon their Fifth
27 Amendment rights, and because certain of
28 the Defendants have indicated their intention

4. Objection. This is argument, not a
declaration of facts. These statements should
not be considered by the Court because the
statements constitute a transparent and bad
faith attempt to exceed the page limitation
ordered by the Court, and are not otherwise
admissible evidence.

1 to seek a stay of this action pending the
2 resolution of the criminal investigation
3 against them, eBay expects that Defendants
4 will continue to refuse to provide discovery
5 responses, including deposition testimony,
6 on any subject until that investigation has
7 concluded. Third, discovery has not been
8 completed in this action and is not currently
9 scheduled to be completed until November
10 20, 2009.

11 5. Attached hereto as Exhibit I is a true and
12 correct copy of the Joint Trial Brief filed by
13 the TD and KFC Defendants in the CJ
14 Action, dated March 6, 2009.

5. Objection. Not relevant (Federal Rule of Evidence ("FRE") 402)

15 6. Attached hereto as Exhibit 2 is a true and
16 correct copy of eBay's Requests for
17 Production to Digital Point Solutions, Inc.,
18 dated January 22, 2009.

6. Objection. Not relevant (FRE 402).

19 7. Attached hereto as Exhibit 3 is a true and
20 correct copy of KFC's Responses to eBay's
21 First Set of Requests for Production, dated
22 February 25, 2009.

7. Objection. Not relevant (FRE 402).

23 8. Attached hereto as Exhibit 4 is a true and
24 correct copy of Thunderwood Holdings,
25 Inc.'s Responses to eBay's First Set of
26 Requests for Production, dated February 26,
27 2009.

8. Objection. Not relevant (FRE 402).

28 9. Attached hereto as Exhibit 5 is a true and

9. Objection. Not relevant (FRE 402).

1	<u>correct copy of BrianDunning.com's</u>	
2	<u>Responses to eBay's First Set of Requests for</u>	
3	<u>Production, dated February 26, 2009.</u>	
4	<u>10. Attached hereto as Exhibit 6 is a true</u>	10. Objection. Not relevant (FRE 402).
5	<u>and correct copy of Dunning Enterprises,</u>	
6	<u>Inc.'s Responses to eBay's First Set of</u>	
7	<u>Requests for Production, dated February 26,</u>	
8	<u>2009.</u>	
9	<u>11. Attached hereto as Exhibit 7 is a true</u>	11. Objection. Not relevant (FRE 402).
10	<u>and correct copy of Brian Dunning's</u>	
11	<u>Responses to eBay's First Set of Requests for</u>	
12	<u>Production, dated February 26, 2009.</u>	
13	<u>12. Attached hereto as Exhibit 8 is a true</u>	12. Objection. Not relevant (FRE 402).
14	<u>and correct copy of T. Dunning's Responses</u>	
15	<u>to eBay's First Set of Requests for</u>	
16	<u>Production, dated February 26, 2009.</u>	
17	<u>13. Attached hereto as Exhibit 9 is a true</u>	13. Objection. Not relevant (FRE 402).
18	<u>and correct copy of Shaw Hogan's</u>	
19	<u>Responses to eBay's First Set of Requests for</u>	
20	<u>Production, March 12, 2009.</u>	
21	<u>14. Attached hereto as Exhibit 10 is a true</u>	14. Objection. Not relevant (FRE 402).
22	<u>and correct copy of Digital Point Solutions,</u>	
23	<u>Inc.'s Responses to eBay's First Set of</u>	
24	<u>Requests for Production, dated March 12,</u>	
25	<u>2009.</u>	
26	<u>15. Attached hereto as Exhibit 11 is a true</u>	15. Objection. Not relevant (FRE 402).
27	<u>and correct copy of KFC's Responses to</u>	
28	<u>eBay's First Set of Requests for Admission.</u>	

1	<u>February 25, 2009.</u>	
2	<u>16. Attached hereto as Exhibit 12 is a true</u>	16. Objection. Not relevant (FRE 402).
3	<u>and correct copy of Digital Point Solutions,</u>	
4	<u>Inc.'s Responses to eBay's First Set of</u>	
5	<u>Requests for Admission, dated March 12,</u>	
6	<u>2009.</u>	
7	<u>17. Attached hereto as Exhibit 13 is a true</u>	17. Objection. Not relevant (FRE 402).
8	<u>and correct copy of KFC's Responses to CJ's</u>	
9	<u>Requests for Production in the CJ Action,</u>	
10	<u>dated March 13, 2008.</u>	
11	<u>18. Attached hereto as Exhibit 14 is a true</u>	18. Objection. Not relevant (FRE 402).
12	<u>and correct copy of Todd Dunning's</u>	
13	<u>Responses to CJ's Requests for Production,</u>	
14	<u>dated March 13, 2009.</u>	
15	<u>19. Attached hereto as Exhibit 15 is a true</u>	19. Objection. Not relevant (FRE 402).
16	<u>and correct copy of the Cross- Complaint</u>	
17	<u>filed by KFC against CJ in the CJ Action,</u>	
18	<u>dated July 25, 2008.</u>	
19	20. Attached hereto as Exhibit 16 is a true	20. No objection.
20	and correct copy of eBay's Subpoena to CJ	
21	to Produce Documents, dated May 4, 2009.	

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1 21. Attached hereto as Exhibit 17 is a true
2 and correct copy of eBay's Subpoena to
3 Ernster Law Offices to Produce Documents,
4 dated May 4, 2009.

21. No objection.

5
6 DATED: June 12, 2009


Respectfully submitted,

7
8 RUS, MILIBAND & SMITH
A Professional Corporation

9
10 By: 
11 LEO J. PRESIADO
12 Attorneys for Defendants
13 THUNDERWOOD HOLDINGS, INC.,
BRIAN DUNNING and
BRIANDUNNING.COM

14 DATED: June 12, 2009

LAW OFFICES OF
PATRICK K. MCCLELLAN

15
16
17 By:  for
18 PATRICK K. McCLELLAN
19 Attorney for Defendants
KESSLER'S FLYING CIRCUS